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No. 75-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Petitioner*,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

and

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

PETITIONER'S REPLY TO APPELLEE-INTERVENORS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

THE DECISIONS OF THE COURTS BELOW REQUIRE ASSOCIATIONS AND THEIR MEMBERS TO ABANDON ONE OF TWO RIGHTS PROTECTED BY THE FIRST AMENDMENT: THE RIGHT TO ASSOCIATE AND REMAIN ANONYMOUS OR THE RIGHT TO ADVANCE COMMON VIEWS THROUGH LITIGATION.

The United Steelworkers of America ("the Union") contends in its opposition to the Chamber's Petition for Certiorari that by alleging injury to its Michigan members the Chamber has perforce made the identity

of each of these members relevant in this matter. This untenable assertion brings into focus the central question now before the Court: whether membership associations can be required, consistent with the constitutionally protected right of freedom of association, to disclose the identity of their members, where only the necessity to establish standing requires a pleading that members suffered injury because of a defendant's conduct.

The Chamber pleaded the injury of its members to obtain standing to bring this action as an association representing its members. The Court has recently reaffirmed the principle first articulated in *Sierra*[1] that to obtain standing to initiate litigation on behalf of its members an association is required to allege "that its members, or anyone of them" are suffering injury (which the Chamber did plead). *Warth* v. *Seldin*, — U.S. —, 95 S. Ct. 2197, 2213 (1975). Standing is not and has not been contested in this case, and accordingly, while it is necessary to plead injury to one or more members, disclosure of the members' identity will not aid in resolving this or—as will be seen—any other issues in this litigation.

The constitutional right of freedom of association comprehends (1) the right of association members to remain anonymous, and (2) the right of association members to advance commonly held views by initiating litigation. See cases cited on page 8 of Petitioner's opening brief; T. Emerson, *The System of Freedom of Expression* 432 (New York, 1970) (". . . associational expression should be entitled to the same complete protection as individual expression."); B. Schwartz, Vol. 1 *Rights of the Person*, 367 (New York, 1968). If

[1] *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

associations are required to disclose the identity of their members when they plead injury to these members solely to obtain standing, associations and their members are placed in the dilemma of choosing to forego one of two constitutionally protected rights. Association members will hereafter be required to choose between abandoning their right of anonymity and disclosing their identities in order that their representative can establish standing to advance their common views in litigation or abandoning their right to further their common goal through litigation.[2] This Hobson's choice should not be imposed upon associations or their members, and accordingly, review is essential to correct the erroneous rulings of the courts below.

II.

THE IDENTITY OF THE CHAMBER'S MEMBERS IS IRRELEVANT TO ANY ASPECT OF THIS PROCEEDING; WHERE A PARTY IS ABLE TO ELICIT ALL OF THE INFORMATION IT NEEDS FROM OTHER SOURCES, AS THE UNION IS ABLE TO DO HERE, DISCOVERY SHOULD BE PRECLUDED, PARTICULARLY WHERE, AS HERE, DISCLOSURE THROUGH DISCOVERY WILL CAUSE SUBSTANTIAL HARM TO OTHER PARTIES IN THE CAUSE.

The Union's contention that the identity of the Chamber's members is relevant to its defense misconceives the concept of relevancy. Rule 401 of the

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[2] Whether courts hold that by alleging injury to members to obtain standing an association either makes the members' identity "relevant" or that members waive their right of anonymity when they support an association type action, the result is the same. Associations and members will be required to abandon one of two rights protected by the First Amendment: the right to associate and remain anonymous or the right to advance common views through litigation.

Rules of Evidence for the United States Courts defines "relevancy" as a relationship between a proffered item of evidence and a "fact that is of consequence to the determination of the action." Whether a fact is of consequence is determined by the substantive law governing the proceeding rather than the rules of evidence. 1 Weinstein's Evidence ¶ 401[03] (1975).

In the underlying litigation, the names of the Chamber's Michigan members do not constitute items of evidence which have a relationship with a consequential fact to the resolution of this cause. The Court in *Super Tire Engin. Co.* v. *McCorkle,* 416 U.S. 115, 124 (1974) established the standard to be applied in cases such as the instant one:

> It cannot be doubted that the availability of state welfare assistance for striking workers in New Jersey pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract. The question, of course, is whether Congress, explicitly or implicitly has ruled out such assistance in its calculus of law regulating labor-management disputes.

To establish the conflict between state payments to strikers and federal labor policy, the inquiry is now limited to an examination of the Congressional commentaries to ascertain if that body "explicitly or implicitly has ruled out [state assistance to strikers]." It is specifically unnecessary to elicit proof that any employer or group of employers has been injured by state benefit payments. *Super Tire* rendered all employers fungible; the injury to each and all employers in a state such as Michigan where unemployment compensation benefits are paid to strikers is conclusively

presumed. Since Congressional intent remains the only consequential fact in this case, and since the identity of the Chamber's members has no relationship to this fact, the identity of these members is not relevant to this cause.[3]

Even under the *Grinnell*[4] standard now superceded by *Super Tire, supra,* there is no basis for such discovery. Consistent with the definition of relevancy set forth above, the material or significant facts include: the fact that Michigan pays unemployment compensation benefits to strikers; the fact that strikes are longer and costlier in Michigan than they are in similar industries in states not granting these benefits; and facts relating to state interest in cushioning the impact of unemployment. Evidence related to these facts include, for example, the length and cost of strikes in Michigan and the length and cost of strikes in similar industries in states that do not pay unemployment compensation to strikers. Other relevant evidence may include expert testimony that demonstrates the impact of benefits on strikes or that establishes the state's interest in paying these benefits. All statistical evidence is readily obtainable from state agencies.

Nor is this discovery essential to the Union's defense.

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[3] The Complaint in this case was drafted before the *Super Tire* decision. Even assuming *arguendo* that before *Super Tire* proof of injury to a particular employer was necessary to sustain this Complaint, *Super Tire* has obviated the necessity of this proof. The Union, therefore, cannot now, in view of *Super Tire*, rely on the pre-*Super Tire* pleadings in this cause which allege injury and successfully contend that because of this pleading, the identity of the Chamber's members is now relevant.

[4] *Grinnell Corp.* v. *Hachett,* 475 F.2d 404 (1st Cir.), cert. denied, 414 U.S. 859 (1973).

Michigan's records furnish the Union with all of the information it needs to refute the Chamber's contentions or to establish its own. These records show, *inter alia,* the identity of employers who were struck, the date the strike began, the date the strike ended and the number of employees idled by the strike. Utilizing this list, the Union may call any or all of the listed employers to the witness stand in an effort to demonstrate that they were not injured because the payment of state unemployment compensation benefits to strikers. Michigan also maintains a list of all employers subject to unemployment compensation, and this list may be utilized by the Union for deposition purposes in non-strike situations.

Where, as here, discovery will cause substantial harm to the Chamber and its members and will produce no relevant evidence, it should not be permitted. Indeed, by permitting discovery, the courts below transgressed the standard of *NAACP* v. *Alabama,* 357 U.S. 449 (1958). As Professor Cox has noted, discovery of the identity of an association's members will be permitted only (1) if this identity is essential to the determination of the case, *and* (2) if the harm resulting from disclosure of the identity of members is slight. A. Cox, *The Warren Court,* 103 (Cambridge, 1969). Here, the first of these conjunctive tests has not been satisfied, since there has been no showing that the identity of the Chamber's members is an item of evidence bearing a relationship to any fact necessary as a matter of law to determine this action. Accordingly, the courts below have misapplied the *NAACP* standard, and this misapplication should be corrected by this Court.

CONCLUSION

Where a party is able to elicit all of the information it needs from other sources, as the Union is able to do here, discovery should be precluded, particularly where, as here, disclosure through discovery will cause substantial harm to other parties in the cause. It is this rule which the Chambers requests the Court to enunciate in order to forestall future attempts at discovery in similar association litigation.

Respectfully submitted,

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